

**Canadian Human
Rights Tribunal**



**Tribunal canadien
des droits de la personne**

Citation: 2016 CHRT 13

Date: June 21, 2016

File No.: T1660/01511

Between:

Christina Green

Complainant

- and -

Canadian Human Rights Commission

Commission

- and -

Trevor Thomas

Respondent

Decision

Member: Alex G. Pannu

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I. Complaint

[1] Christina Green is the Complainant in this case. She alleges that Trevor Thomas, the Respondent, sexually harassed her during a work-related trip in his truck in 2008. Mr. Thomas denies the allegations.

[2] The complaint is filed under section 14(1)(c) of the *Canadian Human Rights Act*.¹ Section 14 says it is a discriminatory practice in matters related to employment to harass an individual on a prohibited ground of discrimination. Section 14(2) deems sexual harassment to be harassment on a prohibited ground of discrimination.

[3] Both parties represented themselves at the hearing. The Canadian Human Rights Commission did not participate at the hearing. Both parties testified and each was their only witness called.

II. Elements of Harassment and Sexual Harassment

[4] Ms. Green must present sufficient evidence, on a balance of probabilities, to substantiate her complaint of harassment. Harassment is any words or conduct that is unwelcome or ought to be known to be unwelcome. It usually denotes repetitious or persistent acts, although a single serious event can be sufficient to constitute harassment. It is determined on a case-by-case basis applying the standard of the reasonable person in the circumstances (see *Canada (Human Rights Commission) v. Canada (Armed Forces)*, 1999 CanLII 18902 (FC) [Franke]).

[5] To constitute sexual harassment, the harassment must be sexual in nature and includes: requests for sexual favours and propositioning; pinching, grabbing, hugging, kissing and leering; and, gender-based insults or remarks regarding a person's appearance or sexual habits.

¹ R.S.C. 1985, c. H-6 (the Act)

[6] The Supreme Court of Canada defined sexual harassment in the workplace in *Janzen v. Platy Enterprises Ltd.*²:

sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. [...] [S]exual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

[7] The Federal Court of Canada-Trial Division elaborated on this definition in *Canada (HRC). Canada (Armed Forces) and Franke*.³ In order for a complaint of harassment to be substantiated, the Court stated that the following must be demonstrated:

(i) The impugned conduct must be of a sexual nature. Requests for sexual favours and propositioning are sexual in nature and constitute a psychological form of sexual harassment. Acts of harassment may also be physical, such as pinching, grabbing, hugging, kissing and leering. The acts could be verbal in nature, as well, encompassing conduct such as gender-based insults or remarks regarding a person's appearance or sexual habits. The Tribunal's determination of what is "sexual in nature" is carried out in accordance with the standard of the reasonable person in the circumstances of the case, keeping in mind the prevailing social norms.

(ii) The acts that are the subject of the complaint were unwelcome. In other words, it must be determined whether the alleged harasser's conduct was desired or solicited. This task can be accomplished by assessing the complainant's reaction at the time of the alleged incidents of harassment, and determining whether she expressly, or by her behaviour, demonstrated that the conduct was unwelcome. The Court recognized, however, that a verbal "no" is not required in all cases and that a repetitive failure to respond to a harasser's comments could constitute a signal to him that his conduct is unwelcome. In these cases, the appropriate standard to apply will again be that of a reasonable person in the circumstances.

(iii) Ordinarily, harassment requires an element of persistence or repetition, but in certain circumstances even a single incident, such as a physical assault, may be severe enough to create a hostile environment. The objective reasonable person standard is used to assess this factor as well.

² [1989] 1 S.C.R. 1252 at p. 1284 (*Janzen*)

³ (1999), 34 C.H.R.R. D/140 at paras. 29-50 (F.C.) (*Franke*)

[8] Together, *Janzen* and *Franke* define the elements that Ms. Green's evidence must establish in order for me to find that she was sexually harassed by Mr. Thomas during that work-related trip in his truck in April 2008.

III. Ms. Green's testimony

[9] Ms. Green was a truck driver in Alberta. She was contracted by KEE Management Solutions Inc., which hired truck drivers, to drive for Quik-X Transportation. Mr. Thomas was also a contractor for KEE but drove for TransX Limited.

[10] No issues were raised with regard to the Tribunal's jurisdiction over the complaint, including that the complaint involved matters related to employment; nor was the Commission's decision to refer the complaint to the Tribunal challenged.

[11] According to her testimony, on April 1, 2008, Ms. Green went to the KEE office in Calgary to pick-up an airline ticket to fly to Langley, British Columbia where she was to retrieve a waiting truck and drive its load back to Calgary. Ms. Green was told by the KEE office manager that Quik-X did not leave an airline ticket for her contrary to what she had been told.

[12] Mr. Thomas was in the KEE office at the same time. Overhearing the conversation, he offered to take Ms. Green to Langley in his truck as he was headed there shortly. Ms. Green said that she accepted the offer reluctantly as she had no other way to get to Langley. They left in Mr. Thomas' truck in the afternoon of April 1, 2008.

[13] Ms. Green says the trip was uneventful at first with the parties chatting about truck driver issues. However, she says before they got to Banff the talk had turned sexual and Mr. Thomas asked her for oral sex. Ms. Green says she refused his advances, swore at him and threatened to report him if he persisted.

[14] Soon after Ms. Green says she wanted to go to the back of the truck cab to rest. As she headed to the back of the truck, she says Mr. Thomas showed her photos of a brunette woman and a man's penis. Ms. Green says he identified the people in the photos as his wife and himself. She says Mr. Thomas continued with sexual comments including

the size of his penis and Ms. Green's breasts. She says he also offered to pull the truck over and perform oral sex on her. She refused and went to the back of the truck to rest.

[15] Ms. Green says that when she attempted to return to the front to sit in the passenger seat, Mr. Thomas grabbed her left buttock with his hand. She says she swatted away his hand. She says he grabbed her buttock a second time and squeezed it. She said she broke away from him and sat down in the passenger seat.

[16] Mr. Thomas stopped the truck in Golden, British Columbia for a short rest stop. Ms. Green slept in the top bunk and Mr. Thomas slept in the bottom bunk. He told her that he slept in the nude. No other verbal or physical interaction occurred during this stop.

[17] The trip continued until they stopped to sleep at the Husky truck stop in Sicamous, British Columbia early on April 2. Ms. Green says that when she awoke, she attempted to quietly climb down from the top bunk without waking Mr. Thomas. She says when she was partway down, she became aware that he was standing behind her. He had his hands on her waist and said he would help her down. Ms. Green says she attempted to go back to the top bunk but could not break free from his grip around her waist. Ms. Green says she did not want to be near Mr. Thomas as she believed he was nude.

[18] She says she jumped down from the top bunk with her back to Mr. Thomas. Mr. Thomas was still holding her by the waist. She says he was rubbing his erect penis on her back and started to lift her off the floor. She yelled and swore at him to let her go. She felt he might rape her, something she had suffered as a teenager. After a struggle, she broke free and ran inside to the bathroom at the Husky station. She was distraught and crying.

[19] She called her spouse Chris May and told him what had happened. She did not want to cause difficulty for Mr. Thomas despite what had happened. She was also concerned about losing her job as she needed the money. She decided to return to the truck and finish the trip. On Mr. May's advice, she keyed in 911 on her cellphone and told Mr. Thomas she would call for help if he attempted any further sexual advances. They drove to Langley without further incident.

[20] Ms. Green testified that she subsequently reported the incident to both KEE and Quik-X. She also stated that she filed a complaint with the police.

[21] Ms. Green also testified that she took three months off to recover from this incident. When she contacted KEE after three months, she was told she was no longer working for them. She has not worked in the trucking industry since and has had great difficulty in finding employment or maintaining jobs she has obtained.

IV. Mr. Thomas' testimony

[22] Mr. Thomas' testimony concurred with that of Ms. Green as to the beginning of their trip. He agreed that he offered her a ride to Langley in his truck while they were at the KEE office in Calgary.

[23] During the trip he admitted that some of his sexual talk to Ms. Green was inappropriate. He admitted telling her that he slept in his truck naked. As to the specific acts of sexual harassment alleged by Ms. Green, he denies they occurred.

[24] For example, he denied asking her for oral sex or offering to perform oral sex on her. He denies showing her nude photos of his wife and himself. He denies standing behind her in the nude and grabbing her waist when she attempted to climb down from the top bunk in the truck.

[25] Mr. Thomas says when the trip concluded in Langley, he dropped Ms. Green at her destination and they parted on normal terms.

V. Complaint substantiated

[26] I am satisfied based on the evidence presented that sexual harassment took place as alleged by Ms. Green. Her submissions and evidence throughout the human rights complaint process were clear and consistent. During her testimony, she provided details of the alleged harassment in a straightforward manner without embellishment or inconsistencies.

[27] Mr. Thomas was a reluctant participant in the process. He did not file a Statement of Particulars and provided only the merest of details during his testimony. His two admissions dealing with inappropriate sexual talk and his preference for sleeping in the nude while in his truck are consistent with the Ms. Green's version of events. Otherwise, he simply denied that the incidents described by Ms. Green occurred.

[28] When given the opportunity to challenge Ms. Green's evidence during cross-examination, he did not do so aside from asking why she did not call the police immediately.

[29] During his testimony, he implied that Ms. Green had an option to travel to Langley with a friend from Quik-X the next day but chose to go with him on April 1. However, even if true, that fact would not change my assessment of the evidence, including Ms. Green's assertions that she indicated to Mr. Thomas that his actions were unwelcomed.

[30] I am not convinced by Mr. Thomas' general denial that most of Ms. Green's allegations did not occur. Rather, on the balance of probabilities, I am satisfied that Mr. Thomas' words and actions on that work-related trip were of a sexual nature, persistent and not welcomed by Ms. Green. She testified how she was affected emotionally by the sexual harassment, which detrimentally affected Ms. Green's dignity and self-respect as a human being.

[31] On the totality of the evidence presented, I find that Mr. Thomas sexually harassed Ms. Green contrary to section 14 of the *Act*.

VI. Order

[32] Ms. Green is seeking \$20,000 for pain and suffering caused by Mr. Thomas pursuant to s. 53(2)(e) of the *Act*, and, \$20,000 as special compensation, under s. 53(3), because his actions were wilful or reckless.

[33] Ms. Green has not worked in a similar capacity in the trucking industry since the sexual harassment in 2008. She testified that as a result of the sexual harassment, she required three months off work to recover and was unable to find similar employment

when she was ready to resume her career. She has worked in a series of other, lower paying jobs. Her common law marriage ended and she has suffered from various health issues.

[34] I have considered the circumstances of the case and reviewed the prevailing case law on non-pecuniary damages in *Goodwin v. Birkett*⁴, and *Boushey v. Shama*⁵. As the Supreme Court of Canada said in *Robichaud v. Canada (Treasury Board)* the aim of the legislation is not to punish the transgressor but, as much as possible, to eliminate such discriminatory behaviour.⁶ I have considered the link between the discriminatory practice and the loss claimed. I find that the sexual harassment from Mr. Thomas caused pain and suffering to Ms. Green. The words and actions of Mr. Thomas caused stress, anxiety and emotional upset to Ms. Green during the trip and for a period of time afterwards to the extent that she felt it necessary to take three months off work. Although the harassment occurred only during the trip, its effects were longer lasting on Ms. Green contributing adversely to her mental state. It may have contributed to the ending of her marriage and her later health problems. For her pain and suffering, I award her the sum of \$5,000 as compensation.

[35] As to whether Mr. Thomas' actions were wilful or reckless, I reviewed the Federal Court's guidance in the case of *Canada (Attorney General) v. Johnstone*⁷,

[A] finding of wilfulness requires the discriminatory act and the infringement of the person's rights under the Act is intentional. Recklessness usually denotes acts that disregard or show indifference for the consequences such that the conduct is done wantonly or heedlessly.

I do not find that his actions were intentional but he failed to appreciate or was indifferent to its effects on Ms. Green. It was isolated to the trip and did not reoccur but had adverse

⁴ 2004 CHRT 29

⁵ 2003 CHRT 21

⁶ [1987] 2 S.C.R. 84 at para. 13

⁷ 2013 FC 113 at para. 154

consequences for her. I find that his conduct was reckless. For that, I award Ms. Green the sum of \$2,500.

[36] Ms. Green also claimed for wage loss for the income she would have received had the sexual harassment not taken place. I find that had the actions of Mr. Thomas not occurred, Ms. Green would not have taken three months off work in 2008. I award her three months of wage loss. In reviewing her income tax records entered into evidence, I use her tax return of 2007 as the base in quantifying the award. In 2007, her earned income was \$22,773 for a monthly average of \$1897.75. I calculate her wage loss award for three months at \$5,693.25. I find that the wage loss claimed by Ms. Green in subsequent periods to be too remote to have a causal link to the sexual harassment that she suffered in 2008. I note that she was able to find employment in a number of other jobs. I also note that her doctor wrote that she was diagnosed with fibromyalgia and lupus in 2010 which could have contributed to her difficulty in finding and holding steady employment.

[37] Ms. Green has also claimed for a number of other incidental expenses such as expenses for moving and for trying to find work. I also find these expenses too remote to be linked to the harassment that she suffered and make no award for these claims.

[38] Simple interest shall be payable on the monetary awards, to be calculated on a yearly basis, at a rate equivalent to the Bank Rate (Monthly series) set by the Bank of Canada. The interest will run from April 4, 2008 until the date of payment of the awards of compensation and wage loss.

Signed by

Alex G. Pannu
Tribunal Member

Ottawa, Ontario
June 21, 2016

Canadian Human Rights Tribunal

Parties of Record

Tribunal File: T1660/01511

Style of Cause: Christina Green v. Trevor Thomas

Decision of the Tribunal Dated: June 21, 2016

Date and Place of Hearing: January 28, 2016

Calgary, Alberta

Appearances:

Christina Green, for herself

No one appearing, for the Canadian Human Rights Commission

Trevor Thomas, for himself